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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WILLIAM L. BURTON, et al.,
Appellants,

vs.

WALKER HOBBIE, JR., etc., et al.,
Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama
(three-judge court)

JURISDICTIONAL STATEMENT

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WILLIAM L. BURTON, PERCY D. BELL, ABRAHAM LINCOLN WOODS, JR., BOBBY JO JOHNSON, ANDREW HAYDEN, FELIX NIXON, EURALEE A. HAYNES, individually and on behalf of all other persons similarly situated,

Appellants,

vs.

WALKER HOBBIE, JR., in his official capacity as Judge of Probate Of Montgomery County and as a representative of the class of all judges of probate in the State of Alabama; DON SIEGELMAN, in his official capacity as Secretary of State of Alabama; CHARLES A. GRADDICK, Attorney General for the State of Alabama,

Appellees.

QUESTIONS PRESENTED

1. May a district court hearing a challenge to a legislative reapportionment plan implement an act of the state legislature which has been submitted to the Attorney General under Section 5 of the Voting Rights Act and to which the Attorney General has objected?

2. Should this Court resolve the split of authority existing between the decision below and *Busbee v Smith,* CA 82-0665, U.S.D.C. for DC, 24 May 1982?

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The District Court's decision and order are attached as Appendix A and its denial of the motion for reconsideration is attached as Appendix B. The 10 August order denying reconsideration after the Attorney General had formally objected to the State's plan is in Appendix C. Neither order has been officially reported.

JURISDICTION

This is an action under the Voting Rights Act, 42 USC §1971 *et seq.*, and 42 USC §1983 to enjoin a legislative apportionment plan adopted by the Alabama Legislature.

The District Court's decision and order were entered on 21 June 1982, Appendix A. The Court denied a motion for reconsideration on 28 June 1982, Appendix B. The Court again denied reconsideration on 10 August, Appendix C. Appellants filed their notices of appeal to this Court on 1 July and 12 August 1982, Appendices D and E. This Court has jurisdiction of this appeal pursuant to 28 USC §1253. *Upham v Seamon*, ___ US ___, 102 SCt 1518, 71 LEd2d 725 (1982); *Connor v Finch*, 431 US 407 (1977); *Connor v Waller*, 421 US 656 (1975); *Taylor v McKeithen*, 407 US 191 (1972); *Connor v Johnson*, 402 US 690 (1971).

STATUTE INVOLVED

Appendix I contains the text of Section 5 of the Voting Rights Act of 1965, as amended.

STATEMENT OF THE CASE

For the third successive decade, a federal court suit has been filed because the Alabama Legislature has refused to follow either the Alabama or Federal Constitution or both in apportioning its members. See *Reynolds v Sims*, 377 US 533 (1964); *Sims v Amos*, 336 FSupp 924 (MD Ala 1972) (three-judge court). In 1981 the Alabama Legislature adopted an apportionnment act, Act 81-1049, which preserved all incumbent members except four in individual districts.[1] White incumbents were uniformly placed in districts with less than 65% black population — the level below which the Justice Depart-

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[1]One pair of incumbents was black, the other pair white. The black pair were purposefully placed in the same district in central Birmingham so that a new seat in north Shelby County (Birmingham suburban area) with an overwhelming white majority could be created. The white legislators were inadvertently placed together: one of them lives on the road which forms the boundary between two districts. He and the other legislators were apparently unaware of this because the plans were drafted in terms of Census districts, tracts, blocks, etc.

ment and many knowledgeable observers hold that a black candidate cannot actually win an election.[2]

The Attorney General interposed a timely objection to Act 81-1049 on 6 May 1982. The delay of six and one-half months between the passage of the act and the Attorney General's objection was due to delays by the State.[3] In contrast to the slowness of the State, the plaintiffs have always moved with dispatch to request relief from the Court: they filed their complaint a few days after the passage of Act 81-1049; and upon the Attorney General's objection, they amended the complaint to take note of this fact, to allege that the 1972 court-ordered apportionment was now outside the permissable limits of a valid one person-one vote plan,[4] and to ask for an emergency preliminary injunction.

Rather than grant the plaintiff's motion for an interim plan at that time, on 21 May the three-judge District Court established a timetable for the State to obtain passage and preclearance of a new apportionment act and for the plaintiffs to file any proposed plans with the Court. The plaintiffs filed their proposed Plans A and B with the Court.

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[2]Cf, *United Jewish Organizations v Carey*, 430 US 144 (1977) (Attorney General used 65% minority population as benchmark).

[3]As District Judge Myron Thompson noted in his dissent (Appendix A, A-16):

> Nevertheless, even though the legislature was aware that the population variances in its current districting plan for both the House and the Senate exceeded what was allowed under the Fourteenth Amendment and further that any new reapportionment plan would have to be preclared by the Attorney General pursuant to Section 5, it was not until October 21, 1981, less than eight months before the machinery for the 1982 elections was to move into gear with the qualifications of persons as candidates, that the Alabama legislature passed a new reapportionment plan for the 1982 elections, Act No. 81-1049; it was not until January 1982, almost three months after the plan was passed and less than six months before the election process was to begin, that the plan was submitted to the U. S. Attorney General for preclearance pursuant to Section 5; and it was not until April 1982, less than two months before the election process was to begin, that the submission was deemed "complete" by the Attorney General.

[4]All parties have now so stipulated. Appendix A, at A-8.

The State Legislature did pass an act of apportionment (Act 82-629) despite a warning by the Attorney General that he had doubts about the validity of the proposed act. See Appendix F. When the Act was submitted to the Attorney General, he replied on 8 June that he was "unable to conclude on the basis of the State's explanation of these matters that the burden under Section 5 has yet been met respecting the House and Senate districts" (one Jefferson County district and six districts in the western Black Belt). See Appendix G. The districts to which the Attorney General referred were exactly those which he had mentioned in his letter of 25 May.

Th District Court heard oral argument (but no testimony) and then requested the parties to submit proposed modifications to Act 82-629 to meet the Attorney General's concerns about the seven districts. Each side did so but emphasized its preference for its own plan: the Act or plan B.[5] The proposed modifications filed by the State actually reduced the likelihood of the election of a black in the Black Belt, while the plaintiffs' modification (Plan C) "rippled" into twenty-six other counties.[6]

The District Court adopted the plaintiffs' proposed modification in Jefferson County by rearranging the boundaries of the district to which the Attorney General had interposed an objection and to two adjacent districts. With regard to the Black Belt, the Court used the Act 82-629 districts for the following reasons (Appendix A, A-8):

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[5]The defendant-appellees refused to submit a modified plan for the Jefferson County district, on the grounds that they would have to change unobjected-to districts. They never explained to the District Court how a change would be made in the composition of only one district without changing others.

[6]At that time both parties agreed that an extensive "ripple" effect would probably be necessary to satisfy the concerns of the Attorney General about the Black Belt. As it turned out, this was incorrect. A plan affecting fewer districts was possible: Plantiffs' Plan D had a far less extensive effect outside the objectionable six districts than had been predicted by both parties.

(1) The Attorney General had not interposed an objection to Act 82-629.[7]

(2) The Court had the choice between "the legislative plan which has been evolving over months or plaintiffs' Plan B which has not been adequately studied or evaluated other than by plaintiffs."[8]

(3) There are as many safe districts for blacks under Act 82-629 as under the 1972 court-ordered plan.[9]

After the Court issued its opinion, the plaintiffs requested the Court to alter or amend its order with respect to the Black Belt districts. With the motion, the plaintiffs presented Plan D which rippled into only five districts other than the objected-to six Black Belt districts.[10] The plan rearranged counties in such a way that most of them were not split or used existing precinct lines. The District Court denied the motion, Appendix B. With the case in this posture, a motion to stay the interim plan was denied by Justice Rehnquist on 6 July 1982 and by Justice White on 9 July 1982.

The instant appeal addresses the District Court's more recent refusal to modify its interim plan even though that plan utilized the six Black Belt House Districts and corresponding Senate Districts to which the Attorney General entered a formal

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[7]The Attorney General's sixty-day consideration period was far from over at that time.

[8]Plan B was unsuccessfully introduced in the special session of the Legislature as a substitute for the bill which became Act 82-629.

[9]The legislature had continued, for the most part, the same policy it had used in Act 81-1049: preserving nearly all incumbents and keeping their districts "safe" for members of their respective race. There were only two legislators paired in the same district, both white. They were paired because of the relative loss of population in Jefferson County: the Justice Department had objected to pairing blacks in Jefferson County, since it would be regressive. Only one white legislator was given a district with more than 65% black population. This had the effect of placing a "cap" on the number of effective black-majority districts. See text at note 2, *supra*.

[10]Plaintiffs and their counsel had been unaware of the possibility of Plan D until after the District Court's order of 21 June. Since the State had also not proposed this particular configuration, we must presume that they were not aware of this possibility.

objection on 2 August 1982. On 10 August 1982, the three-judge Court denied plaintiffs' motion to amend the interim plan in light of the Attorney General's Section 5 objection. The District Court gave the Legislature until 1 February 1983, to adopt and to obtain preclearance of a new reapportionment plan, Appendix J, but it authorized the use of the objected-to Black Belt districts in the forthcoming 1982 election and did not specify when a special election thereafter would be ordered. Appendix K. The defendants have now filed a motion with the District Court asking for an even greater time period (four months – until 1 June 1983) in which to complete passage and Section 5 submission of a third reapportionment act. Appendix L.

THE QUESTIONS ARE SUBSTANTIAL

I. This Court has Jurisdiction and Authority to Grant Relief Without Plenary Consideration.

Political party primaries are scheduled for 7 September and the general election is set for 2 November. If no action is taken by the Court to delay the general election for legislators, elections will be held under a legislatively enacted plan to which the Attorney General has objected under Section 5 of the Voting Rights Act.

Appellants ask that the Court summarily vacate the decision of the District Court and remand for the adoption of another interim or permanent plan which does not violate Section 5.

In prior cases, the Court has granted interim relief – prior to plenary consideration – to vacate orders of lower courts implementing court-ordered plans which fail to secure the constitutional and statutory rights of minority voters. In *Conner v Johnson*, 402 US 690 (1971), on an application for a stay, this Court stayed the District Court's order implementing a multi-member legislative district which submerged the voting strength of black voters, and remanded the case to the District court to devise a single-member district plan. Similarly, in *Taylor v McKeithen*, 407 US 191 (1971), on a petition for a

writ of certiorari, this Court summarily vacated the decision of the Court of Appeals adopting an alternative plan which the District Court held diluted black voting strength.

In *Conner v Waller*, 421 US 6 56(1975), prior to plenary consideration and on the jurisdictional statement, the Court reversed the District Court's judgment approving a redistricting plan in violation of the guarantees of the Voting Rights Act. In *Conner v Finch*, 431 US 407 (1977), this Court granted an expedited appeal from a judgment implementing a court-ordered plan, reversed, and gave specific guidance to the District Court to avoid the dilution of black voting strength and to "allay suspicions and avoid the creation of concerns that might lead to new constitutional challenges," 431 US at 425.

On the basis of these precedents, this Court has full authority to grant the relief requested in this application.

II. The District Court's Order Violates Section 5 of the Voting Rights Act.

The principal reason for appealing is to contest the unprecedented ruling below that a voting procedure to which the Attorney General has objected pursuant to §5 may nonetheless be used for future elections, in the complete absence of any exigent circumstances.

This Court has consistently held that changes in voting required to be pre-cleared may not be implmented in future

[11] *Allen v State Board of Elections*, 393 US 544, 572 (1969) ("All four cases are remanded to the District Court with instructions to issue injunctions restraining the further enforcement of the enactments until such time as the States adequately demonstrate compliance with §5."); *Perkins v Matthews*, 400 US 379, 397 (1971) ("the case is remanded to that [district] court with instructions to issue injunctions restraining the further enforcement of the changes until such time as the appellees adequately demonstrate compliance with §5."); *Georgia v United States*, 411 US 526, 541 (1973) ("The case is remanded to the District Court with instructions that any future elections under the Georgia House reapportionment plan be enjoined unless and until the State, pursuant to §5 of the Voting Rights Act, tenders to the Attorney General a plan to which he does not object, or obtains a favorable declaratory judgment from the District Court for the District of Columbia."); *Dougherty County, Georgia, Board of Education v White*, 439 US 32, 36 (1978) (affirming the district court's

elections absent §5 compliance.[11] Despite this line of cases, the District Court in this case chose to implement the change to which the Attorney General had indicated his preliminary objection.

In his letters dated 8 June and 2 August 1982, the U.S. Attorney General informed the Alabama Attorney General and the District Court that the State has failed to satisfy its burden under Section 5 of the Voting Rights Act, 42 USC §1973c, with respect to the Black Belt House Districts 83, 85, 86, 87, 88, and 90 and the corresponding Senate Districts.[12] Nevertheless, the District Court implemented the objectionable districts in Act 82-629 as part of the Court's interim reapportionment plan.

In this respect, the District Court"s order squarely contravenes Section 5 of the Voting Rights Act, which provides that a standard, practice, or procedure may not be enforced by a covered jurisdiction unless it

> has been submitted by the chief legal officer or other appropriate official of such state or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such a submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission the Attorney General has affirmatively indicated that such an objection will not be made.

In *United States v Board of Supervisors of Warren County, Mississippi*, 429 US 652 (1977), this Court held that no District Court, except that in the District of Columbia, had the power to authorize a State to use an act which had not received the preclearance of the Attorney General.

The policy determinations of Congress in enacting the Voting Rights Act "reflect a congressional choice in favor of specialized review — either by the Attorney General of the United States

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injunction of a voting change "pending compliance with the preclearance requirements of §5."); *Canady v Lumberton City Board of Education*, _____US_____, 102 SCt 494, 70 LEd2d 373 (1981) (Court granted a stay to prohibit the implementation of an objected-to annexation).

[12]Senate Districts are formed by combining three contiguous House Districts. The corresponding Senate Districts are numbered 28, 29, and 30.

or by the United States District Court for the District of Columbia." *McDaniel v Sanchez*, 452 US 130, at 151. Any consideration by the District Court of the validity of the state's racially discriminatory policy contradicts the rule firmly established in prior cases that under the Voting Rights Act, the validity of such considerations is expressly "reserved by §5 for consideration by the Attorney General of the United States or the District Court for the District of Columbia." *Perkins v Matthews*, 400 US 379, 386 (1971). See also, *Conner v Finch*, 431 US 407, 412 (1977); *Connor v Waller*, 421 US 656 (1975); *Allen v State Board of Elections*, 393 US 544, 561 (1969).

This rule was completely ignored by the District Court when it held (Appendix A, A-7, 9):

> The Supreme Court has made it clear that "reapportionment is primarily a matter for legislative consideration and determination." *White v Weiser*, 412 US 783, 795 (1973); *Upham v Seamon*, ___ US ___, 102 SCt 1518 (1982). In *Weiser*, the Supreme Court reversed the district court because "in choosing between two possible court-ordered plans, it failed to choose that plan which most closely approximated the state plan." 412 US at p. 797.
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> Consistent with *Upham v Seamon, supra; White v Weiser, supra;* and *Terrazas v Clements, supra*, this Court is of the opinion that it is obligated to order the implementation on an interim basis of the redistricting of the Legislature as prescribed in Act No. 82-629 with the exception of the modification in Jefferson County.

This reliance was misplaced because there was no Voting Rights Act issue in *White v Weiser*: at that time Texas was not subject to the preclearance provisions of Section 5.

In *Upham v Seamon*, ___ US ___, 102 SCt 1518, 71 LEd2d 725, 730 (1982), this Court stated:

> We have never said that the entry of an objection by the Attorney General to any part of a State plan grants a district court the authority to disregard aspects of the legislative plan not objected to by the Attorney General.

But the *Upham* Court did not hold that a district court may consider as valid state policy parts of a legislative act to which the Attorney General has objected. *Upham* did not change the law as enunciated in *Warren County*: the State has the burden of proving that its act is not discriminatory in purpose or effect — and the proper forum for such an attempt at proof is *not* the local district court.

The District Court's order implementing as an interim plan the Black Belt legislative districts which the Attorney General has affirmatively indicated are objectionable fundamentally undermines the preclearance scheme of the Voting Rights Act and places the burden of time and persuasion on the innocent victims of racial discrimination — the intended beneficiaries of the Act. If this order is allowed to stand, it will also afford direct precedent for the State of Alabama and for other jurisdictions covered by the preclearance provisions of the Voting Rights Act to delay compliance with Section 5 long enough to force a federal district court to enter an interim plan which, as in the instant case, shifts the burden of time and persuasion in a manner the Voting Rights Act is designed to prevent. The District Court correctly allocated the burden in its earlier order of 21 May 1982: "the defendants be and they hereby are allowed until June 8, 1982, to obtain the necessary pre-clearance of their plan from the United States Department of Justice ***." However, in the 21 June order, this Court stated

> The letter of the Attorney General of the United States did not refuse to preclear the legislative plan of the Alabama Legislature. The Attorney General pointed out correctly that the law allows him sixty days within which to consider any plan. Understandably, he said that in the period of two weeks from the time the plan was submitted to him until June 8, his evaluation could not be favorably completed "at this time." In his earlier letter of May 25, the Attorney General stated that his analysis of the plan was "limited by extreme time constraints and a lack of opportunity for effective and informed public comment." The motion asks this Court to treat these statements as the Attorney General's rejection of Alabama's legislative

> plan. The Attorney General may still reject the plan. It appears clear that he has not acted in time for the elections to proceed in accordance with any decision he renders.

This makes it quite clear that the Court has placed the burden on the plaintiffs and the U.S. Attorney General, rather than the State.

The Attorney General's objection to Act 82-629 (dated 2 August) has now removed any possibility of an argument that the Court need not consider Section 5 questions because the Attorney General had not yet objected. This is clear from reading *Hathorn v Lovorn*, ___ US ___, 50 USLW 4664, 4667 n.16 (15 June 1982):

> Finally, the presence of a court decree does not exempt the contested change from §5. *** When state or local officials comply with a court order to enforce a state statute, there is no doubt that their actions "reflec[t] the policy choices of . . . elected representatives." Indeed, it §5 did not encompass this situation, covered jurisdictions easily could evade the statute by declining to implement new state statutes until ordered to do so by state courts. *** In light of *McDaniel* [*v Sanchez*, 452 US 130 (1981)], we conclude that a state court decree directing compliance with a state election statute contemplates "administ[ration]" of the state statute within the meaning of §5.

This holding in *Hathorn* is consistent with the decision in *Busbee v Smith*, an unreported decision. On 24 May, a three-judge District Court for the District of Columbia unanimously refused to allow the State of Georgia to use a plan for the election of members of Congress to which the Attorney General had objected. The Court noted,

> The State's apparent strategy is to proceed with implementation of Act No. 5 to such an extent that if the Act is not validated, the State can argue tha exigent circumstances dictate the use of the plan embodied in the Act for at least the upcoming elections.

Busbee v Smith, CA 82-0665, 24 May 1982, ms. op. at 3 n.1.

The District of Columbia Court correctly allocated the burden of Section 5 preclearance to the State, rather than to the

challengers, as did this Court in the instant case. Both *Hathorn* and *Busbee* hold that a court may not allow a State to utilize a statute that has not been submitted to and precleared by the U.S. Attorney General. To the extent that the District Court has done exactly that, it has erred.

The District Court has allowed the preclearance provisions of the Voting Rights Act to be turned into a potent new weapon in favor of the State against racial minorities, who not only must defer to the judgment of the U. S. Attorney General, but who must find themselves foreclosed from seeking plenary review and relief from racially discriminatory voting enactments. In the instant case, with the results afforded by the District Court's 21 June 1982 Order, it can fairly be argued that black citizens of Alabama would be better off without the Voting Rights Act; at least they would have been entitled to a full trial on their State and Federal constitutional claims and to timely relief when their civil action was originally filed in 1981 — a few days after the original apportionment act was passed.

III. The District Court Had Options Other Than The Adoption of the Objected-To Black Belt Districts.

When faced with the exigencies of time deadlines and impending elections, federal district courts have many options available to them in fashioning interim relief. But they do not have the option chosen by the District Court's 21 June Order of authorizing the implementation of state-adopted reapportioned districts that squarely violate the preclearance provisions of the Voting Rights Act; nor may a District Court justify a direct contravention of the Voting Rights Act on the ground that the alternative proposals of the parties are also objectionable. In this event, Appellants respectfully submit it is the duty of the District Court to choose some other option, among which are the following:

(1) Instruct the parties to modify their proposed plans to correct deficiencies noted by the Court or to present entirely new plans meeting the Court's specifications;

(2) Adopt its own reapportionment plan, using its own resources or by appointing an expert or master to accomplish the task for the Court;

(3) Instruct the Attorney General of the United States to appear as amicus curiae to advise the Court about his opinions concerning the appropriateness of the proposed plans under Section 5 standards or to propose the Attorney General's own plan.

If the choice of the aforesaid options or any others interpose substantial time delays, the Court should additionally consider options for adjusting the timing of elections, including the following:

(1) Postponing qualifying deadlines;

(2) Postponing other State deadlines for preparing for election;

(3) Ordering special procedures to be used to enable the primary elections to go forward on time;[13]

(4) Postponing the primary elections themselves;

(5) Ordering that no primary elections be held and that only the general election be conducted for the Alabama Legislature;

(6) Postponing both the primary and general elections for the Alabama Legislature until an adequate interim plan has been devised and a special election can be ordered.

Even though the above options involve delays which are undesirable and ought to be avoided, the District Court is duty bound to utilize one or another of such options if that is necessary to avoid a direct circumvention and violation of Section 5 of the Voting Rights Act. The explicit congressional purpose of Section 5 is to place the burdens of time and persuasion on

[13]The Legislature has already adopted Act 82-658, containing temporary measures to handle some of the problems that will develop in the legislative elections. The District Court could easily have utilized this Act as a statement of the legislative policy on how to conduct the elections if some modifications were necessary.

the State before it may implement new voting practices and procedures.[14] The District Court's order implementing as an interim plan the Black Belt legislative districts which the Attorney General has affirmatively indicated are objectionable fundamentally undermines the preclearance scheme of the Voting Rights Act and places the burdens of time and persuasion on the innocent victims of racial discrimination – the intended beneficiaries of the Act. If this order is allowed to stand, it will also afford direct precedent for the State of Alabama and for other jurisdictions covered by the preclearance provisions of the Voting Rights Act to delay compliance with Section 5 long enough to force a federal district court to enter an interim plan which, as in the instant case, shifts the burden of time and persuasion in a manner the Voting Rights Act is designed to prevent.

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[14]The *Busbee v Smith* Court, for example, has required the State of Georgia to schedule new primaries for its congressional seats because its earlier plan was objected to by the Attorney General under the Voting Rights Act. Atlanta *Journal*, 25 August 1982, p. 1.

CONCLUSION

For these reasons, the Appellants pray that the Court grant a stay of the District Court's order, and vacate and remand to the District Court for the purpose of implementation of a plan which does not adopt parts of the State's plan to which the Attorney General has objected.

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